Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-1619

ROBERT R. LaPUMA,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I

The Hobbs Act, 18 USC § 1951, requires both that a defendant's conduct pose a realistic probability of an effect on interstate commerce, and that such effect would be an adverse one; the Trial Court refused to so instruct the jury in the instant case, and the Court of Appeals' affirmance of the Petitioner's conviction betrays both a misconstruction of the Statute and a need for guidance from this Court 5

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—•—

Robert R. LaPuma, by and through his attorney, N. C. Deday LaRene, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit of April 14, 1978, affirming his conviction on a One Count Indictment for violation of 18 USC § 1951.

OPINION BELOW

The Sixth Circuit Court of Appeals did not file a formal written opinion; a copy of its unreported Order of April 14, 1978, is appended hereto as Appendix A.

JURISDICTION

The Order of the Sixth Circuit Court of Appeals of April 14, 1978, affirmed the Petitioner's conviction herein. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTION PRESENTED

Whether the Hobbs Act, 18 USC § 1951, requires a "realistic probability" of an effect on interstate commerce, and whether such effect must be adverse; whether the Petitioner was wrongfully convicted in view of the Trial Court's refusal to so charge, and of the evidence presented.

STATUTE INVOLVED

Section 1951, Title 18, United States Code provides, in pertinent part:

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

* * *

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

Petitioner Robert R. LaPuma was charged in a One Count Indictment with violation of the Hobbs Act, 18 USC § 1951. He was convicted after a jury trial and sentenced on June 16, 1977 to seven years in prison.

The proofs offered by the Government, when viewed in a light most favorable to the Government's theory, established at best that the Petitioner had confronted one Thomas Kremski, the owner and operator of a local amusement device company, in a bar in the City of Detroit, where Kremski had come to install a new machine, and told him that he (Kremski) already had enough machines in the bar, and that he was not to bring any more into the bar unless there was some kind of "settlement." After an exchange of words, in which it was alleged in part that the Petitioner demanded a meeting with Kremski, and asked Kremski how much he would pay to keep the Petitioner from smashing his machines, the Petitioner threw a bottle at a pinball machine owned by Kremski and placed by him in the bar, breaking the back glass of the machine.

The proofs further showed that both the machine and the broken glass, which Kremski subsequently replaced. must have travelled in interstate commerce, and further, that Kremski had a number of machines, all of which, prior to his ownership of them, and his placement of them in bars and other places around the City of Detroit, had travelled in interstate commerce.

Kremski himself did no business directly with any out-of-state suppliers. However, he purchased all of his machines and the parts therefor from a company which in turn ordered its machines and supplies from out of state suppliers.

REASONS FOR GRANTING THE WRIT

THE HOBBS ACT, 18 USC § 1951, REQUIRES BOTH THAT A DEFENDANT'S CONDUCT POSE A REALISTIC PROBABILITY OF AN EFFECT ON INTERSTATE COMMERCE, AND THAT SUCH EFFECT WOULD BE AN ADVERSE ONE; THE DEFENDANT'S CONVICTION WAS WRONGFULLY HAD AND WRONGFULLY SUSTAINED INASMUCH AS THE TRIAL COURT REFUSED TO SO INSTRUCT THE JURY, AND IN VIEW OF THE INSUFFICIENCY OF THE EVIDENCE TO ESTABLISH THESE ELEMENTS.

Section 1951 of Title 18 prohibits conduct which "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce." The Government has taken the position that the interstate commerce element is satisfied by any effect — whether adverse or beneficial — and an attempted extortion need only have the potential to affect commerce, however slight or subtle. *See* Government's Opening and Closing Statements. (Tr 8, 380-384). *See also* Government's Response to Order Granting a Bill of Particulars, 5-6.

The Trial Court adopted , for the most part, this position by instructing the jury that any effect in any way or degree on interstate commerce, however slight, subtle or potential, will satisfy this element. In so doing, the Court rejected a fair construction of the statute, and the analysis of the case law that there must be an *adverse* effect upon interstate commerce.

Although the Hobbs Act uses the language "obstructs, delays or affects commerce," the principle of *ejusdem generis* and the Congressional history of the statute require the conclusion that it prohibits only acts which interfere,

in some fashion, with interstate commerce. *Ejusdem generis*, of course, states that, where particular words of a statute are followed by general ones, the general words are restricted in meaning to objects of like kind or nature where to do so would not subvert the intention of the legislation. *See Garner v. Louisiana*, 368 US 157, 168, 82 S Ct 248, 7 L Ed 2d 207 (1961); *United States v. Salen*, 235 US 237, 249, 35 S Ct 51, 59 L Ed 210 (1914). Here the verb "affects" follows "obstructs" and "delays". The intent, therefore, was not to prohibit acts which affect in a positive way interstate commerce since this would be inconsistent with the prior two, more specific words. Representative Hobbs explained that the intent of the Act was to cover interference with interstate commerce. 89 Cong. Rec. 3217 (1943). Moreover, application of the principle of lenity in construing criminal statutes requires this interpretation. *See United States v. Bass*, 404 US 336, 347, 92 S Ct 515, 30 LEd 2d 488 (1971).

This construction is so fundamentally accurate that most of the cases construing the statute have apparently taken it for granted. In *Stirone v. United States*, 361 US 212, 218, 80 S Ct 270, 4 L Ed 2d 252 (1960), this Court stated that the two essential elements of § 1951 are: "interference with commerce, and extortion." The Court subsequently used the term "burdened" as synonymous with "interfered." *Id.* at 218-219.

Numerous other cases, using various terms, have stated that one of the essential requirements of this offense is that the defendant's conduct had an adverse effect upon interstate commerce. *United States v. Gupton*, 495 F2d 550,

551 (5th Cir 1974) (obstructing commerce); *United States v. Biondo*, 483 F2d 635, 640 (8th Cir 1973), *cert denied*, 415 US 947 (1974) (harm to interstate commerce, threatened interference); *United States v. Nakaldski*, 481 F2d 289, 298 (5th Cir 1973), *cert denied*, 414 US 1064 (1974) (adversely affected interstate commerce); *United States v. Addonizio*, 451 F2d 49, 59 (3d Cir), *cert denied*, 405 US 936 (1972); *United States v. Esperti*, 406 F2d 148, 150 (5th Cir 1969), *cert denied*, 395 US 938 (1969) (interference with interstate commerce); *United States v. Critchley*, 353 F2d 358, 361 (3d Cir 1965) (interference with interstate commerce).

Defendant requested that, as one of the essential elements of the offense, the jury be instructed that the Government had to prove that, in committing the extortionate acts, "interstate commerce was delayed, interrupted or adversely affected." The Government requested that the jury be charged on this element that the jury must determine "that there was an effect in any way or degree on interstate commerce as a result of Defendant's actions."

The Trial Court instructed on this element as follows:

> In order to establish the offenses charged, the government must prove beyond a reasonable doubt four essential elements:
>
> * * *
>
> Third, that there was an effect on interstate commerce as a result of defendant's action;
>
> (Tr 446)

The Court elaborated on this element:

> The statute prohibits extortion which in any way or degree affects interstate commerce. It is not necessary that the purpose of the extortion be to affect interstate commerce, but only that one of the natural effects thereof be an obstruction of that commerce, however slight, subtle or potential. The government need prove only that the attempt to commit extortion had the potential to affect interstate commerce.
>
> The term interstate commerce means the purchase, sale or exchange of commodities, goods or property between any point within a state and any point outside of the state. In order for the government to show an effect on interstate commerce, the evidence must convince you beyond a reasonable doubt that the glass used to replace the broken glass in the pinball machine located in the Gin Mill Bar was manufactured outside the state of Michigan and that Thomas Kremski purchased machines to be used in his business which were manufactured outside of the State of Michigan.
>
> (Tr 447-448)

The Defendant objected to the denial of his requested instruction and the giving of the Government's requested instruction. (Tr 455-457)

Devitt & Blackmar in their widely used work, *Federal Jury Practice and Instructions,* (3rd Ed. 1977), have examined

these authorities and concluded that the jury should be instructed as proposed in Defendant's requested instruction:

> § 56.04 *Essential Elements*
>
> In order to establish the offense charged in the indictment, the government must prove three essential elements, as follows:
>
> *First*, that the defendant induced his victims to part with property;
>
> *Second*, he did so by "extortion" as defined in these instructions;
>
> *Third*, that in doing so, interstate commerce was delayed, interrupted or adversely affected.

In rejecting this formulation of the essential elements of the offense, the Court reduced the Government's burden on the interstate commerce element to almost nothing. It is impossible to conceive of any act by an individual which does not have a slight, subtle or potential effect — beneficial or adverse — on interstate commerce. The Court's rejection of the "adversely affected" language and abandonment even of the statutory language made the jury's deliberation on this element a foregone conclusion. However far the statute will extend in this area and however minimal the proof must be, it is clear from the cases and statutory history that federal jurisdiction does not extend this far.

Moreover, there was insufficient evidence to prove a realistic or reasonable probability of an adverse effect upon interstate commerce. This element is not established

by a "potential," however "slight" or "subtle." Although several cases have held that no actual interference is required, there must be a realistic probability of some effect upon interstate commerce, *United States v. Staszuk*, 517 F2d 53, 59-60 (7th Cir), *cert denied*, 423 US 837 (1975), or some reasonably probable effect. *United States v. Spagnolo*, 546 F2d 1117, 1119 (4th Cir 1976). Other cases have evinced an intention to achieve the same result by requiring that the Defendant's behavior have the "natural effect" of obstructing commerce. *See United States v. Gupton*, 495 F2d 550-551 (5th Cir 1974) and *United States v. Varlack*, 225 F2d 665, 672 (2d Cir 1955). By diluting the element further in this respect, the Trial Court in this case instructed the jury that an effect need only be a possibility, however slight. This was erroneous since there must be some realistic likelihood, some probability of an adverse effect.

Moreover, even when considered in a light most favorable to the Government, the testimony was insufficient as a matter of law on the essential element of the Hobbs Act that the Defendant's conduct obstructed, delayed or adversely affected interstate commerce, or could have done so.

Basically, the evidence presented by the Government on this element was that Defendant made threats of economic harm to an individual proprietor who made no purchases directly from interstate commerce, but whose equipment had been manufactured out of the state and then sold to distributing companies who, in turn, sold them to the proprietor. Thomas Kremski had 40 to 50 machines which he placed in 25 establishments in the Detroit area. (Tr 68-69). He purchased his machines from several distributing businesses located in the City of Detroit:

Empire Distributing, Miller, Newark & Company and Martin-Snyder Company. (Tr 69, 72). Mr. Kremski testified further that replacement parts were obtained from the "factory distributor." (Tr 71). The Government elicited no further testimony concerning the status of the Miller, Neward & Company and the Martin-Snyder Company. Likewise no other evidence was presented as to the frequency with which Mr. Kremski had transacted business with these companies. As to Empire Distributing, from whom Mr. Kremski purchased the machine which the Defendant damaged, later testimony by the agents of Empire demonstrated that Mr. Kremski's assessment of its business status was erroneous since it was a separate in-state business entity.

There was sufficient evidence that the Defendant damaged the back glass of a "Bally Champ" pinball machine which was manufactured and sold by Valley Manufacturing Company of Chicago, Illinois. (Tr 276-280, 324). Mr. Kremski, operating under the name of Reliable Shuffleboard Company, purchased a back glass from Empire Distributing of Michigan, Inc., a corporation operating only in Michigan, which was a wholly owned subsidiary of Empire Distributing, Inc., an Illinois corporation. (Tr 327-328). The Empire sales representative was unable to testify whether the part was specially ordered, but he stated that it was normally stocked. (Tr 311) The branch manager testified that he assumed that it was in stock when ordered by Mr. Kremski. (Tr 316)

Defendant moved for judgment of acquittal on the grounds, *inter alia*, that there was no showing of any reasonable likelihood of an adverse effect upon interstate commerce.

Defendant has argued elswhere in this brief that the trial court applied an improper standard on the interstate commerce element both in denying Defendant's motion for judgment of acquittal and in rejecting Defendant's proposed jury instruction. Statutory construction of § 1951, utilizing the principles of *ejusdem generis*, and an examination of the case law makes clear that the accused's conduct must have had an adverse effect upon interstate commerce. *See, e.g. Stirone v. United States*, 361 US 212, 218, 80 S Ct 270, 4 L Ed 2d 252 (1960) and *United States v. Gupton*, 495 F2d 550, 551 (5th Cir 1974).

No delay, interruption, interference or adverse effect upon the flow of goods in interstate commerce was demonstrated by the Government's evidence. There was no evidence of any actual effect — adverse or otherwise — by Defendant's conduct. The replacement part was apparently in stock at the Detroit distributor when it was ordered by Mr. Kremski. In any event, the transportation of a single item between states cannot, by any stretch of the imagination, interrupt or interfere with interstate commerce. If anything, this would increase the flow of goods.

There is, likewise, no reasonable or realistic probability that his behavior would obstruct interstate commerce. *See United States v. Gupton, supra, United States v. Staszuk*, 517 F2d 53, 59-60 (7th Cir), *cert denied*, 423 US 837 (1975). In determining whether Defendant's conduct posed a reasonably probable threat to harming interstate commerce, it is important to remember the extent of his participation, which, taken in a light favorable to the Government, consisted of a single instance of damaging part of a pinball machine and threatening, on a single occasion, to cause further problems. At no time after the

night in question did Defendant seek money or threaten Kremski in any way. Nor did the Defendant attempt to set up the meeting which the two had allegedly discussed. Even if the Defendant's conduct exceeded mere preparation and constituted an attempt to extort, it must nevertheless be sufficiently specific and likely so that the adverse effect upon interstate commerce is not merely speculative.

Considering the uncertainty and lack of evidence regarding a connection between Mr. Kremski and the movement of goods in interstate commerce and the limited nature of any conduct on the part of the Defendant, it cannot be concluded that there was a realistic probability that interstate commerce would be obstructed.

In addition to the absence of an adverse effect on interstate commerce, the connection between the alleged victim and interstate commerce was so attenuated as to negate proof of the element. *United States v. Merolla*, 523 F2d 51 (2d Cir 1975), is instructive as to the nexus between the victim and interstate commerce which is necessary under § 1951. In that case the Defendant was an automobile dealer who hired an individual named Goberman to build a car facility for him. When Goberman slowed construction, the Defendants threatened and physically injured him. Under threats, Goberman paid one of the Defendants money. Goberman had received a considerable amount of goods which had been shipped in interstate commerce, and his subcontractors were doing business in interstate commerce.

Merolla rejected the Government's argument that Goberman's assets had been depleted thus diminishing his ability to buy from interstate commerce. The Court also rejected the theory that precluding the contractor by

force from engaging in interstate commerce and replacing him affected interstate commerce. The test, said the Court, is whether the victim customarily obtained supplies from interstate commerce in a continuing relationship.

> As for the depletion of assets theory, we have no difficulty with the general premise. Where the victim of an extortion scheme customarily obtains supplies through interstate commerce, the diminution of the victim's resources impairs his purchasing power and may therefore be found to affect interstate commerce for the purpose of the Hobbs Act.
>
> * * *
>
> The victim's purchase of interstate goods, however, must be of a continuing nature or the relationship between the extortion and any interstate commerce becomes merely conjectural. The cases relied upon by the government all involve ongoing establishments with recurring shipments from out-of-state.
>
> 523 F2d at 54.

Finding no such relationship in the facts in that case, *Merolla* concluded that the evidence only established a case of assault and/or extortion under state law and the conviction was reversed with directions to dismiss the indictment. See also *United States v. Critchley*, 353 F2d 358 (3d Cir 1965) and *United States v. Archer*, 486 F2d 670 (2d Cir 1973).

There was no evidence in the present case that Kremski customarily obtained supplies through interstate commerce. It is true that some of his supplies and equipment had once passed in interstate commerce. There is a significant distinction, however, in that he was dealing with in-state suppliers and was not receiving

recurring out-of-state shipments. Moreover, there is no showing as to when or how frequently these goods were obtained. On this record, the government asked the Court to conjecture ,as to an adverse effect upon interstate commerce.

The formula implicitly adopted by the Sixth Circuit Court of Appeals by its affirmance of the Petitioner's conviction is in marked contrast to the approach of the Second Circuit in *United States v. Merolla, supra.* This conflict between the Circuits alone would justify the granting of the Writ herein prayed for. However, beyond this, the Court should grant the Writ prayed for because the Sixth Circuit in its decision herein has allowed and countenanced a radical expansion of the scope of the important provision of federal statutory law here involved without mandate from the Congress, and, indeed, in apparent conflict with this Court's implicit interpretation of the Statute, and, at the least, bespeaks a need for guidance from this Court.

CONCLUSION

It is therefore respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the important questions herein presented with respect to the interpretation and application of the Hobbs Act, 18 USC § 1951.

Respectfully submitted,

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Dated: May 11, 1978

APPENDIX A

ORDER OF SIXTH CIRCUIT COURT OF APPEALS
Filed April 14, 1978

(United States Court of Appeals
For the Sixth Circuit)

77-5230

United States of America, Plaintiff-Appellee v. Robert R. LaPuma, Defendant-Appellant.

Before: WEICK and ENGEL, Circuit Judges and CECIL, Senior Circuit Judge.

Defendant appeals his conviction for extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951.

Finding no merit in any of the errors alleged by the defendant on appeal,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk